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No. 01-384

IN THE

Supreme Court of the United States

ED BROWN, *et al.*,
Petitioners,

v.

JAMES GILMORE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

We are reminded in these difficult times of the Framers' justifiable fear of mixing religious fervor and civil authority. Religion and government combine with unique power and coercive effect. It is for this reason that the First Amendment erects a wall of separation between church and state, which for over two centuries has served to protect religious freedom by committing matters of prayer and religion to the private sphere and individual choice.

Importantly, Petitioners do *not* dispute that there is nothing to fear from a classroom of otherwise silent and thoughtful children, who may wish to reflect upon the events of September 11 or silently pray upon their own initiative. Brief in Opposition to Petition for Writ of Certiorari ("Opp.") at 1.[1] However, there is everything to fear when civil authority oversteps the bounds of governmental neutrality and *mandates* observance of a minute of silence in every public school classroom that, because of the legislative and political grandstanding that accompanies the statute, "may appear to the [children] to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). In *Wallace v. Jaffree*, 472 U.S. 38 (1985), a clear majority of this Court invalidated a statute very similar to the Virginia law at issue here. It did so because, as with Virginia, the Alabama legislature overstepped the bounds of government neutrality in a similar (albeit more brazen) fashion. This petition presents the same circumstances raised in that seminal case, and the First Amendment's Establishment Clause, as interpreted in *Wallace v. Jaffree*, requires invalidation of Virginia Code § 22.1-203.

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[1] Where possible, this brief will cite to the appendix attached to the Petition for a Writ of Certiorari (*e.g.*, Pet. App. 73a-74a). Where necessary, Petitioners will cite the joint appendix used in the court of appeals (*e.g.*, JA-298).

SUMMARY

In their Opposition, Respondents (collectively, the "Commonwealth") pursue a number of different and sometimes conflicting tactics.[2] Some are aimed at muddling the factual record, some are targeted at rewriting the appropriate legal standards, but all are designed to distract the Court's attention away from the real issues of this case and to convince this Court "to pretend that [it] do[es] not recognize what every . . . student understands clearly—that this [statute] is about prayer." *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 315 (2000). This Court should "refuse to turn a blind eye to the context in which this [statute] arose, and that context quells any doubt that this [statute] was implemented with the purpose of endorsing school prayer." *Id.*, 530 U.S. at 315.

I. THE COMMONWEALTH'S FACTUAL MISDIRECTION

In its Statement of the Case, the Commonwealth erects a series of strawmen—through irrelevant, inadmissible, and/or plainly incorrect factual assertions—in order to clutter the landscape of this litigation and distract the Court from the record of impermissible legislative purpose that requires invalidation of Virginia's minute of silence law. In particular, the Commonwealth refers the Court to various putative "expert" opinions on religion and schools from individuals who had nothing to do with the passage of the minute of

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[2] For example, the Commonwealth and, indeed, the bill's sponsor have contended at various points that the Virginia minute of silence law is not concerned with religion or prayer. *See* Opp. at 7 (quoting Sen. Barry) ("[T]he purpose of the Bill . . . is not a religious crusade . . . [or to] reinject prayer. . ."). Yet, repeatedly throughout its Opposition, the Commonwealth argues that the statute is *necessary* to combat discrimination against prayer and to accommodate prayer. *See, e.g., id.* at 21. In fact, the preamble to the statute expressly states that its purpose to guarantee the "free exercise of religion." Pet. App. 72a.

silence statute (Opp. at 4-7), unrelated pieces of state legislation and federal legislative proceedings (*id.* at 5-6), and excerpts from unrelated Presidential remarks delivered at a speech some five years before the challenged statute was introduced. *Id.* at 6. Similarly, the Commonwealth devotes roughly half of its Statement of the Case to "facts" regarding the *implementation* of either the 1976 version or 2000 version of Va. Code § 22.1-203. *Id.* at 3-5, 10-11.

This case, however, concerns *only the 2000 version* of the minute of silence law and only that statute's *facial validity*. As this Court has recognized, expert testimony of the sort proffered by the Commonwealth lacks probative value in a facial challenge suit under the Establishment Clause, where the principal inquiries revolve around the text of the statute, its contemporaneous legislative history, and, ultimately, the legislature's purpose in enacting it. "[T]he postenactment testimony of outside experts is of little use in determining the Legislature's purpose in enacting the statute," particularly where, as here, "none of the persons making the affidavits . . . participated in or contributed to the enactment of the law." *Edwards v. Aguillard*, 482 U.S. 578, 595-96 (1987). The same applies to the Commonwealth's discussion of Virginia's "guidelines on constitutional rights and restrictions relating to prayer and other religious expression in the public schools," the U.S. Congress' consideration of the Equal Access Act, and remarks by former President Bill Clinton. These "facts" bear no relationship to the Commonwealth's enactment of the minute of silence statute.[3]

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[3] Petitioners properly raised their objections to this proffered evidence in both the district court and the court of appeals and preserve those objections here. *See* Fed. R. Civ. P. 56(e). Petitioners also note that the Commonwealth's objections regarding the admission of newspaper articles evidencing legislative intent are misplaced. *See* Opp. at 8-9 n.7. These accounts describe public statements of public officials and are intended by the speakers to be disseminated widely to their

Once these entirely irrelevant, inadmissible, and/or incorrect assertions are dispatched with, what is left is a plain and compelling set of facts, as set forth in the Petition for a Writ of Certiorari, which requires invalidation of the law at issue.

II. THE COMMONWEALTH'S LEGAL MISDIRECTION

The Commonwealth argues that this Petition should not be granted to resolve the apparent conflict between the court of appeals' decision here and this Court's decision in *Wallace v. Jaffree*, 472 U.S. 38 (1985), principally because, in the Commonwealth's view: (1) *Wallace* is too "fact-specific" to be of any precedential value whatsoever; (2) the Virginia minute of silence statute, which expressly provides for prayer and was accompanied by an official, communicated legislative endorsement of school prayer, is "different" than the Alabama statute invalidated in *Wallace*, which expressly provided for prayer and was accompanied by an official, communicated legislative endorsement of school prayer; and (3) the standards governing judicial inquiry into legislative purpose in Establishment Clause cases and the *Wallace* decision itself should be rewritten, in part by cobbling together selected portions of dissenting and concurring opinions, to stand for the proposition that a statute expressly providing for prayer must be constitutional—no matter how steeped in religious purpose—so long as it is accompanied by the smallest scintilla of concurrent secular objectives. The Commonwealth's efforts to avoid this Court's review cannot

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constituents. Importantly, the Commonwealth has never questioned the veracity of these accounts and they were cited extensively by the court of appeals. Similarly, in another moment of silence case, the Third Circuit concluded that the district court did not err in considering newspaper articles that discussed the state legislators' intent in passing the statute. *May v. Cooperman*, 780 F.2d 240, 252 n.9 (3d Cir. 1985).

withstand scrutiny and, indeed, only emphasize the appropriateness of granting the Petition.

A. This Court's Controlling Precedent Set Forth in *Wallace v. Jaffree* is Not So Limited as the Commonwealth Suggests.

The Commonwealth argues that this Court's decision in *Wallace v. Jaffree* is nothing more than a fact-specific "test case" of little precedential value, because Alabama enacted its minute of silence in open defiance of this Court's decision regarding public school prayer in *Engel v. Vitale*, 370 U.S. 421 (1962). In this case, the Virginia General Assembly enacted its minute of silence simultaneously with a joint resolution that expressly criticized this Court's decision in *Engel v. Vitale*, and openly called for a return of prayer to the public school classroom. Pet. App. 73a-74a.[4] However, the Commonwealth argues that these two circumstances are sufficiently distinct to require a difference in constitutional result, in large part because Virginia chose a "perfectly legitimate exercise" for returning prayer to the public schools (*i.e.*, passing a resolution seeking a constitutional amendment), while Alabama "unlawfully flout[ed] this Court's jurisprudence." Opp. at 20.

This argument is not only factually flawed, but entirely misses the point. The issue under *Wallace* is not whether the *methods* employed by Virginia or Alabama to achieve an unconstitutional result are themselves legitimate. Rather, it is whether the communicated *purpose* of the legislature is constitutionally impermissible. Thus, regardless of precisely *how* Alabama conveyed the message to its public school

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[4] The Commonwealth disingenuously claims that simultaneous passage of the minute of silence statute and the joint resolution is nothing more than a "coincidence of timing" and that both were merely passed in the "same year." Opp. at 20. The Virginia Senate, in fact, approved the two measures on the *very same day*.

students that its minute of silence statute carried with it a state endorsement of prayer, the statute was invalidated because that intent did exist and it was communicated to the students. Although Virginia undertook a somewhat less brazen approach in implementing its desire to return prayer to the public school classroom, that purpose nevertheless existed and was conveyed to Virginia's public school children.

Perhaps recognizing the inevitable application of *Wallace* to the case at hand, the Commonwealth argues that the Virginia minute of silence statute is nevertheless constitutional because, unlike its Alabama counterpart, it is animated by three "secular" purposes: (1) guaranteeing students' religious liberty (*i.e.*, students' right to pray) in public schools; (2) advancing pedagogical goals, such as good order and discipline and introspection; and (3) extending the benefits of a minute of silence (*i.e.*, mandating its observance) statewide while providing a defense to any lawsuit challenging it. Opp. at 2. *See also id.* at 19-23. Of course, only the first and third of these stated purposes may be gleaned from the text of the statute, which makes no mention whatsoever of any pedagogical goals.[5] But, whatever the

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[5] Moreover, the first proffered purpose, while expressly set forth in the text of the statute, is entirely transparent. The Commonwealth contends that the minute of silence statute is somehow necessary to protect against an unidentified religious discrimination and boldly asserts that "the record . . . shows a tendency toward discrimination against religious expression in the public schools." Opp. at 19. *See also id.* at 15. However, the "record" evidence to which the Commonwealth refers consists *entirely* of the various *post-hoc* "expert" affidavits, unrelated Presidential remarks, and unrelated legislative proceedings discussed above, all of which have been properly objected to and all of which are entirely irrelevant, much less demonstrative of any threat of religious discrimination. Furthermore, the Commonwealth has admitted—and, indeed, trumpeted—that, even in the context of prior minute of silence exercises in the Virginia public schools, there has been no evidence of "peer on peer harassment or other problems," and that the minute of silence "worked well and has not caused anyone a problem." Opp. at 4.

stated purpose of this statute (or, for that matter, whatever inconsequential differences in wording or context might exist between the Virginia statute and the Alabama statute), what makes this case constitutionally indistinguishable from *Wallace* is the presence of a statute that expressly provides for prayer accompanied by legislative grandstanding that undeniably conveys a message of endorsement of public school prayer. The communicated message that the state endorses group prayer in the public schools—as manifested in the minute of silence statute—is the concern of the First Amendment and was the concern of this Court in *Wallace*.

The Commonwealth then posits that this Court, in *Wallace*, "made it plain that a statute with a dual legislative purpose – part secular and part religious—***would*** pass the [purpose] prong [of the *Lemon* test]." Opp. at 13 (emphasis added). Accordingly, the Commonwealth self-servingly concludes that state action must be deemed constitutional unless it has *no* secular purpose (*id.* at 18)—regardless of how predominant any religious motives might have been—even though the Commonwealth has admitted that such a standard would render the first prong of *Lemon* an "all-but-impossible" hurdle for citizens seeking to validate their First Amendment rights. JA-298. Indeed, under the Commonwealth's approach, a statute that is 99% motivated by a religious intent, clearly communicated to the citizenry, ***must*** be upheld if some of the supporters perceived secular benefits that might flow from it as well.

Of course, neither *Wallace* nor any other decision of this Court has set forth such an unworkable position. To the

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But, even if some such threat did exist, the Commonwealth has conceded that the First Amendment already protects students' free exercise of religion in such circumstances, thereby obviating the need for the challenged statute to do so. *See* JA-301 ("If local school officials were to discriminate against silent prayer, it would violate First Amendment rights.").

contrary, *Wallace* unambiguously stated that "a statute that is motivated in part by a religious purpose ***may*** satisfy the first criterion [of the *Lemon* test]." *Wallace*, 472 U.S. at 56. *Wallace* did not hold, as the Commonwealth would have it, that such a statute "***would*** satisfy" or "***does*** satisfy" or even "***likely*** satisfies" the purpose test. Rather, the *Wallace* decision recognizes that a statute with mixed legislative motives may or may not satisfy the First Amendment, depending upon the circumstances of the case. The statute in question must be motivated by a secular purpose and "[t]hat requirement is not satisfied . . . by the mere existence of ***some*** secular purpose, however dominated by religious purposes." *Lynch v. Donnelly*, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring) (emphasis added). *See also* Petition for a Writ of Certiorari at 23-24 (citing *Edwards*, 482 U.S. at 594; *Stone v. Graham*, 449 U.S. 39, 41 (1980); *School Dist. of Abington Township v.* Schempp, 374 U.S. 203, 224 (1963)).[6] Thus, even if the General Assembly was able to perceive some secular pedagogical advantages in the minute of silence exercise, the Virginia minute of silence statute was so dominated by religious purposes that it cannot pass constitutional muster. No effort by the Commonwealth to rewrite the governing legal standards can alter this result.[7]

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[6] The Commonwealth essentially concedes that the cases cited in the petition command a "less rigorous approach to dual purpose statutes" than what the Commonwealth now suggests is the governing standard. Opp. at 28. However, the Commonwealth urges that this approach should be confined to cases in which the challenged activity is not "inherently religious." *Id.* at 28-29. Even if the Court were to adopt this novel approach, there can be no doubt that the challenged activity here—a mandatory exercise encouraging silent student prayer—is an inherently religious activity.

[7] Petitioners have never, as the Commonwealth alleges, argued that the appropriate standard under the first *Lemon* prong is that the legislative purpose must be "wholly secular," nor has Petitioner's position on this issue ever been a "moving target." Opp. at 18. To the contrary, at every

Likewise, the Commonwealth engages in a baffling rewriting exercise, in which it attempts to piece together various dissenting and concurring opinions from *Wallace* in order to rewrite the plain ruling of the majority opinion. Opp. at 21-22. In particular, the Commonwealth argues that, when *Wallace* is viewed through the Commonwealth's own mysterious calculus, it is actually a 5-4 majority decision holding that a state's intentional and express endorsement of prayer within the text of a minute of silence statute is not constitutionally fatal (*id.*), even though the *Wallace* majority (by a 6-3 vote) unambiguously stated that, by including the word "pray" in a minute of silence statute, "the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion." *Wallace*, 472 U.S. at 60. The Commonwealth may not rewrite the controlling decisions of this Court in order to remove constitutional obstacles to its own agenda.

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level of this litigation, Petitioners repeatedly and consistently have taken the same position—as set forth above—regarding the appropriate standards to be applied under the purpose prong of the *Lemon* test. The district court inexplicably misread or mistook Petitioners' position on the appropriate standard to apply (Pet. App. 63a), and now the Commonwealth appears bent on perpetuating that misstatement of Petitioners' position. Even a cursory review of *any* brief filed at *any* level in these proceedings by Petitioners reveals the Commonwealth's charge to be a knowing distortion of the record. *See, e.g.*, JA-446 (Petitioners stating to district court that, under *Wallace*, "a statute that is motivated in part by a religious purpose ***may*** satisfy the first criterion [of the *Lemon* test]."). Indeed, Petitioners addressed this very same misstatement in their submissions to the court of appeals. *See* Opening Brief of Appellants at 24 n.7.

B. The Commonwealth's Opposition Highlights the Need for the Court to Provide Guidance Regarding the Application of the "Religious Purpose" Prong.

As the foregoing discussion illustrates, there are significant questions regarding precisely how much non-secular purpose is enough to invalidate a statute and how, and why, the communicated purpose underlying the statute should be weighed in determining whether an otherwise permissible exercise of legislative power must be held inconsistent with the Establishment Clause. The Court should grant the Petition to provide guidance in this regard.

Moreover, the Commonwealth's brief further emphasizes the need for the Court to address the methodology for ascertaining precisely what the purpose or purposes underlying a statute are. For example, the Commonwealth asserts three proffered "secular" purposes in defense of the statute, the second of which is nowhere found in the text of the statute. Opp. at 2. And while Petitioners agree with the Commonwealth's assertion that "there is no rule requiring all purposes of the law to be placed in the text in order to be counted" (Opp. at 20), the question remains as to where those purposes should appear and/or where a reviewing court should look for them, as well as what weight should be given to the various (and sometimes competing) sources of legislative intent. Accordingly, this Court should grant the Petition in order to provide guidance as to the appropriate method for determining legislative intent for Establishment Clause cases.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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